IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 187

MENOMINEE TRIBE OF INDIANS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO THE GOVERNMENT'S MEMORANDUM

The Government says "on reconsideration, however, we now view the question as less clear."[1] We suppose this is the closest the Government is likely to come to admitting that it made an unfortunate mistake the last time this case was offered to this Court. The last time, the Court will recall, the Government took the position that the Tribe had only the hunting and fishing rights that any landowner has.[2] It is too bad the Government had not discovered its doubt by then; perhaps then the Tribe would have been spared the substantial additional expenses it incurred (and paid) in litigating the question of compensation before the Court of Claims.

The Government several times refers to the "majority" of the Court of Claims. We would remind this Court

---

[1] Govt. Memo. p. 3 n.2.

[2] Govt. Memo., Sanapaw v. Wisconsin, No. 930 O.T. 1963.

that even the minority favored the Tribe; it agreed that the Indians either owned the rights or should be paid for their loss.[3] Indeed, that is exactly our position; although the Tribe as a matter of policy would prefer to have its hunting and fishing rights, rather than compensation, its position at this stage of the litigation is merely to ask this Court to decide the matter one way or the other.

The Government,[4] now conceding the Tribe may have hunting and fishing rights after all, believes that any such rights would be subject to "reasonably necessary" State conservation laws, citing *Tulee* v. *Washington*, 315 U.S. 681 (1942).[5] Therefore, reasons the Government, the Wisconsin Court reached the right result because the game regulations before it "appear to be reasonably necessary conservation or safety measures."

Bypassing the relevance of "safety" considerations, we can hardly agree with the Government's glib characterization of hunting with an artificial light (i.e., jacklighting) as a "reasonably necessary" conservation rule. In an ordinary context, of course, it probably is a reasonably necessary conservation rule. But we are not defining "necessary" in an ordinary context; we are defining the word in the context of an Indian treaty, where there are very strong opposing policy factors. As used in *Tulee*, the word meant, we think, "so necessary that Indian treaty rights should give way to it." In that sense, it cannot tenably be argued that enforcement of the jacklighting rule is so important that an Indian treaty right to hunt in a certain area should yield to it (at least not without a showing that the game is in

---

[3] Dissent, reprinted in the Appendix of our main brief herein at p. 38.

[4] Govt. Memo. p. 4.

[5] Actually, *Tulee* says "necessary", not "reasonably necessary" 315 U.S. at 684.

imminent danger of extinction due to Indian jacklighting, and that such extinction would affect public hunting rights outside the reservation). If the jacklighting rule deserves such importance, then *all* state conservation rules are "necessary", and the Indians' rights are totally meaningless.

Although the Government does not mention it, and although this is a point better reserved for argument on the merits, we are obliged to point out that the meaning of *Tulee's* "necessary" has been the subject of a substantial body of conflicting jurisprudence. See, for example, the following cases, which dealt with treaty hunting and fishing rights outside Indian reservations:

a. *Makah Tribe* v. *Schoettler*, 192 F.2d 224 (9th Cir. 1951) (state has burden to prove its conservation rule is "necessary.")

b. *State* v. *Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), cert.den. 347 U.S. 937 (state cannot enforce any conservation rules at all against Indians with treaty rights).

c. *Maison* v. *Confederated Tribes*, 314 F. 2d 169 (9th Cir. 1963), cert.den. 375 U. S. 829 (state can restrict Indians only if adequate conservation cannot be achieved by restriction of whites).

d. *Confederated Tribes* v. *Maison*, 262 F.Supp. 871 (D.Ore. 1966) (if state wants to reduce deer and elk kill, it should issue fewer licenses to sportsmen).

e. *Dept. of Game* v. *Puyallup Tribe*, —— Wash. 2d ——, 422 P.2d 754 (1967) (disagrees with *Maison* v. *Confederated Tribes*, above, and would make the state's burden much easier.)

Perhaps this case is a propitious vehicle to resolve some of the conflicts which have arisen over the interpretation of *Tulee*, but until these conflicts are resolved, it is certainly conjectural on the Government's part to suggest what conservation rules may be "necessary" under the *Tulee* standard.

Respectfully submitted,

CHARLES A. HOBBS,
Counsel for Petitioner

WILKINSON, CRAGUN & BARKER
Angelo A. Iadarola

FOLEY, SAMMOND & LARDNER
James R. Modrall, III
Of Counsel